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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1946.

No. 185-186

ANCHOR SERUM COMPANY, a corporation of Missouri,
Petitioner,
vs.
AMERICAN COOPERATIVE SERUM ASSOCIATION,
a corporation of Iowa,
Respondent.

ILLINOIS FARM BUREAU SERUM ASSOCIATION,
a corporation of Illinois,
Petitioner,
vs.
AMERICAN COOPERATIVE SERUM ASSOCIATION,
a corporation of Iowa,
Respondent.

Petition for writs of certiorari to the United States Circuit Court of Appeals, for the Seventh Circuit, and brief in support thereof.

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Petition for writs of certiorari to the United States Circuit Court of Appeals, for the Seventh Circuit, and brief in support thereof.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioner, Anchor Serum Company, hereinafter called Petitioner Anchor, and the Petitioner, Illinois Farm Bureau Serum Association, hereinafter called Petitioner Illinois, each jointly and separately pray that writs of certiorari issue to review the judgments of the United States Circuit Court of Appeals for the Seventh Circuit, filed and rendered March 4, 1946 (R. 1247 to 1269, incl.), which judgments became final by the overruling of Petitioners' joint petition for rehearing on the 3rd day of April, 1946 (R. 1347) by which final judgment, the judg-

ment of the District Court of the United States for the Northern District of Illinois, Eastern Division, was affirmed as to $13,347.93 and reversed as to the remainder (R. 1247 to 1269, incl.). Mandates have been stayed to give Petitioners an opportunity to apply to this Court for Writs of Certiorari (R. 1351). Petitioners are jointly interested in the judgments and join in this Petition pursuant to Rule 48 of this Court.

STATUTE RELIED UPON TO SUSTAIN THIS COURT'S JURISDICTION.

Petitioners rely upon the provisions of Sec. 240 of the Judicial Code, 28 U. S. C. A., Sec. 347, to have Writs of Certiorari granted and to sustain the jurisdiction of this Court.

FEDERAL STATUTES NECESSARY TO BE CONSTRUED.

This case presents to this Court a highly important construction of the provisions of the Anti-Hog-Cholera Serum and Hog-Cholera Virus Act of 1935, hereinafter for brevity referred to as the Serum and Virus Act. This Act was an amendment to the Agricultural Adjustment Act. This Act is found in 7 U. S. C. A., Secs. 851 to 855, incl. Sub-sections (6), (7), (8) and 9 of Sec. 608a and Sub-sections (7), (14) and (15) of Section 608c of 7 U. S. C. A. are made applicable in connection with orders issued. It also made Sec. 608d of 7 U. S. C. A. applicable in connection with the Marketing Agreement and Orders of the Secretary issued. Sub-sections (a), (b), (2), (c), (f), (h) and (i) of Sec. 610 of 7 U. S. C. A. were made applicable to the administration of the Act. These Sections are set out in full in the Appendix.

SUMMARY AND SHORT STATEMENT OF THE CASE.

NATURE OF THE CASE.

This action was brought in the District Court to recover triple damages under the Anti-Trust laws and, particularly, for alleged and purported violations of the Robinson-Patman Act. (R. 63 to 69, incl., R. 2 to 11, incl.).

SOME OF THE MATERIAL FACTS OF THE CASE.

The Respondent is a cooperative association organized under the laws of Iowa and engaged in the manufacture and distribution of serum and virus. Petitioner Anchor is a Missouri corporation engaged in the manufacture and distribution of serum and virus and other products. Petitioner Illinois is a cooperative association organized under the laws of Illinois and engaged in the distribution of serum and virus "to its members" within the state of Illinois only.

On December 2, 1936, the handlers and manufacturers of serum and virus entered into a Marketing Agreement by and with the approval of the Secretary of Agriculture, hereinafter referred to as the Secretary. On the same date the Secretary promulgated an Order regulating the industry (R. 663 to 692, incl.). At the same time there was created a Control Agency to administer the Act, the Order and the Marketing Agreement (R. 668 to 671, incl., 681 to 684, incl.).

Thereafter, the different handlers and manufacturers of serum filed their postings as to prices, terms of sale and discount with the Secretary and with the Control Agency, including Petitioner Anchor and Respondent and its assignor (R. 693 to 699, incl., 265, 266, 269 to 271, incl., 779 to 783, incl.). During all the period of time in question Petitioner Anchor had filed postings for sale to all four

classes of purchasers; volume contract purchasers, wholesalers, dealers and consumers (R. 693 to 699, incl.). In Petitioner Anchor's postings as to terms of sale, from December 14, 1936 to July 16, 1939 there was contained the following:

"We also spend liberal allowances for advertising and sales promotion work."

In Petitioner Anchor's postings effective July 16, 1939, and all postings thereafter, this was eliminated (R. 695 to 699, incl.). After that time Petitioner Anchor spent no allowances for advertising and sale promotion work to Petitioner Illinois (R. 158, 306, 587, 594, 595). Petitioner Anchor's postings and filings at all times remained in full force and effect (R. 522, 523).

During all the time in question Petitioner Illinois was a volume contract purchaser and was so bulletined by the Control Agency to the trade (R. 273, 521). It was the only volume contract purchaser in this territory, and the only one with whom Petitioner Anchor dealt. (R. 140, 166).

From December 16, 1936 to May 27, 1937, Respondent's assignor, American Serum Company, had postings for sale at 75¢ per 100 ccs. to consumers and 63¢ per 100 ccs. to dealers (R. 265, 266, 779, 780). From June 7, 1937 to August 29, 1939, Respondent had postings for sale only to consumers at 75¢ per 100 ccs. (R. 269, 270, 780, 781). Respondent at no time was authorized to sell to volume contract purchasers, wholesalers or dealers (R. 674, 687, 271, 693 to 699, incl., 780 to 783, incl.).

Petitioner Illinois agreed with Petitioner Anchor to carry on advertising, educational and promotional work (R. 562 to 654, incl.). From December 1936 until July 1, 1937, Petitioner Anchor paid Petitioner Illinois for this

purpose an allowance of .04 per 100 ccs. Between July 1, 1937 and March 25, 1938, it paid an allowance of .08 per 100 ccs. (R. 132 to 134, incl., 139). From March 25, 1938 to July 15, 1939, an allowance of .13 per 100 ccs was made. After July 15, 1939, no further allowances were made or paid (R. 158, 306, 587, 594, 595).

Petitioners' Illinois membership during the period of time in question consisted of all the County Farm Bureaus in Illinois, whose membership ranged from 64,000 to 75,000 (R. 403, 511, 441). Such County Farm Bureaus, during this period, sold serum only to from 19,000 to 20,000 of their farmer members (R. 403). During the period in question there were over 160,000 farmers in Illinois raising hogs (R. 485). With the exception of the parties hereto, there were at least forty (40) other competitors selling serum (R. 362).

During the period in question Petitioner Illinois performed its agreement with Petitioner Anchor and advertised the serum in the statewide publication known as Illinois Agricultural Association Record and the county publications of the county units, neither of which accepted advertising from outside sources (R. 440, 441, 558, 559). Between 80,000 and 85,000 of these publications were circulated among members of the Illinois Agricultural Association and the different County Farm Bureaus. The publicity department of the Illinois Agricultural Association would give news releases pertaining to serum to daily and weekly newspapers, press associations and radio stations. Additional instructions were given at statewide meetings, district meetings, township meetings and group meetings. Demonstrations as to how to care for, vaccinate and treat swine were held. The farmer members of the county farm units would teach each other. Petitioner Illinois designed

and produced a sound motion picture entitled "Swine Insurance", showing the necessity of and the proper method to treat hogs with serum, both before and after vaccination. This picture was shown at different public meetings and at different clubs (R. 564 to 566, incl., 511 and 581).

Petitioner Illinois sold serum only to its member County Farm Bureaus, who sold serum only to farmers and consumers who were members of the Farm Bureaus (R. 401, 461, 468, 168, 580, 583, 584, 586, 403, 404, 406, 435, 414). Not to exceed two percent (2%) of its sales might have been made through error to former members who were not in good standing (R. 580, 583, 584, 468). Petitioner Illinois never sold serum to drug stores (R. 580).

Respondent admittedly was not soliciting or trying to sell the members of Petitioner Illinois (R. 280).

Respondent in making the sales in Illinois at a less price than its posted price violated the Serum and Virus Act, the Order of the Secretary and the Marketing Agreement (Par. B, Sub-section 7, sec. 608c, 7 U. S. C. A., Par. 3, Sec. 1, Article IV of both the Order and Marketing Agreement, R. 674, 687), and subjected itself to a fine of from $50. to $500. for each offense under the provisions of Sections (14) and (15) of Sec. 608c of 7 U. S. C. A. It is the alleged difference between its posted price and what it alleges and claims it sold its serum to consumers upon which it bases its damages. This is the only alleged and purported damage for which Respondent sues to recover (R. 372, 63 to 69, incl.).

Respondent's President after denying that it reduced its sales price or gave any credits outside the state of Illinois, admitted that in some towns in Iowa it gave credits for veterinarians employed to go out and help farmers vaccinate and administer the serum, which the Respondent's

President called "Sales Expense" (R. 356 to 360, incl., 373 to 375, incl.).

Petitioners were denied the right to prove that Respondent's sales in Illinois increased from 2,523,625 ccs. in 1937 to 4,167,125 ccs. in the fiscal year from March 1, 1939 to February 29, 1940 (R. 618).

In twelve (12) of the thirty-five (35) towns in Illinois where Respondent claimed it was required to reduce its selling price, there was not located any office of the Farm Bureau or county unit members of the Petitioner Illinois (R. 411 to 413, incl.). In the fifteen (15) counties where Respondent admits it did not reduce its prices, the Farm Bureau was represented in each county and had offices in six (6) of the same towns (R. 407).

It was admitted by Respondent's President that during the year of 1936 the Illinois Farm Bureaus were selling serum at 65¢ per 100 ccs. and that during all the times in question they sold serum to their members at 65¢ (R. 285).

Petitioner Anchor was denied the right to plead and prove that in July 1939 the Control Agency filed a complaint against Petitioner Anchor, involving the same matters of which complaint is made herein, and that said complaint was dismissed by the Secretary because notice that said allowances were made was included in the publicly filed price list of Petitioner Anchor, and that the practice of spending liberal allowances for advertising and sales promotion work was acquiesced in by the Control Agency and indulged in by other members of the industry without complaint being filed by the Control Agency, and when complaint was made, Petitioner Anchor revised its postings to conform to the objection (R. 530, 531, 97, 98, 115).

Respondent offered no evidence whatsoever with any probative force or effect that the acts, of which complaint is made, required or necessitated Respondent to reduce the selling price of its serum. Respondent's President testified that when he learned the Farm Bureaus were selling at 65¢, he instructed Respondent's warehousemen to reduce their price to meet the competition because Respondent couldn't get more than that (R. 242, 243). Respondent's President admitted that prior to the Marketing Agreement the industry was demoralized and Respondent could not sell its serum for 75¢ (R. 283).

Respondent's Assistant Sales Manager, Davis, testified that their druggists complained and Respondent reduced its selling price (R. 293, 294). Davis admitted on cross examination that he had never talked with a single one of Respondent's customers and that all he knew about it was that the druggists told him (R. 315).

Both witnesses, Huff and Davis, testified that during all the times in question they sold part of their serum in Illinois at 75¢ (R. 279, 280, 315, 316). Respondent's witnesses did not know whether they had ever sold any serum to members of the Illinois Farm Bureau (R. 316). No other evidence even of a hearsay and opinionated nature on this question was offered by Respondent.

VERDICT OF JURY FOR PETITIONERS.

The trial court held and instructed the jury as a matter of law, over both of the Petitioners' objections and exceptions, that the acts of these Petitioners, of which complaint is made, were unlawful and in violation of the Robinson-Patman Act (R. 633 to 636, incl.).

The court submitted the case to the jury upon two questions only, namely:

1. Was the Respondent damaged as the result of the Petitioners' violation of the Robinson-Patman Act?

2. If so, the amount the Respondent was so damaged. (R. 636 to 640, incl.).

The jury found the issues for the Petitioners, finding that the Respondent had not been damaged by the acts of the Petitioners (R. 1163).

JUDGMENT OF THE DISTRICT COURT.

The District Court sustained the Respondent's motion for a judgment notwithstanding the verdict and assessed the Respondent's damage at the highest amount claimed and asserted by the Respondent under its evidence and rendered judgment in triple of said amount in the sum of $17,666.10 and in addition thereto an attorney fee of $2500. In the alternative, the District Court decreed that if this ruling was held to be error that the District Court then would sustain Respondent's motion for a new trial. (R. 641, 1165, 1166).

THE OPINION OF THE CIRCUIT COURT OF APPEALS.

The opinion of the Circuit Court of Appeals appears in 153 Fed. (2d) 907 to 918, incl. It appears in the record 1247 to 1267, incl. The judgment of affirmance was rendered by a divided court (R. 1247 to 1269, incl.).

Circuit Judge Major, in his dissenting opinion, held that Respondent's evidence, upon which both the judgment of the District Court and the judgment of affirmance of the majority of the Circuit Court of Appeals was based, was not only hearsay but was hearsay heaped upon hearsay and was perhaps inadmissible for any pur-

pose and certainly not that for which it was offered, and that a verdict should have been directed for your Petitioners (153 Fed. (2d) 915 to 917, incl.) (R. 1259 to 1263, incl.). Judge Major, further in his dissenting opinion, held that if he be in error in that conclusion that the evidence presented an issue of fact for a jury's determination; that on this question the case was properly submitted to the jury and that the jury's answer should have been accepted; and that the District Court's action in entering a judgment notwithstanding the verdict was erroneous and should be reversed (153 Fed. (2d) 917 to 918, incl.) (R. 1263 to 1267, incl.).

QUESTIONS PRESENTED.

I.

EXEMPTION FROM THE ANTI-TRUST LAWS.

After the members of the industry, pursuant to the provisions of the Serum and Virus Act, entered into a marketing agreement, by and with the approval of the secretary, and after the secretary promulgated his order regulating the industry, and after the control agency was established to assist and administer the act, the order of the secretary, and the marketing agreement, and after the members of the industry filed their postings of prices, terms of sale and discount, and after the industry started operation under the act in question, were or were not the members of the industry exempt and immune from the provisions of the Anti-Trust Laws

(a) Were the members of the industry while so operating, in the event of violations of the Serum and Virus Act, the order of the secretary and the marketing agreement, subject to the penalties and liabilities imposed by the Anti-Trust Laws in addition to the penalties and liabilities imposed by the Serum and Virus Act?

II.

DENIAL OF DUE PROCESS OF LAW.

Did the action of the majority of the Court of Appeals, in affirming the judgment of the Trial Court in setting aside the verdict of the jury in favor of petitioners and rendering judgment N.O.V. in favor of respondent, based entirely upon hearsay and opinionated evidence without any direct evidence whatsoever that the acts of which complaint is made damaged respondent, deprive these petitioners of their property without due process of law?

III.

DENIAL OF TRIAL BY JURY.

Were petitioners by the action of the majority of the Court of Appeals deprived of their constitutional right of trial by jury?

IV.

DEPARTURE FROM USUAL JUDICIAL PROCEDURE BY LOWER COURT.

Is not the opinion of the majority of the Circuit Court of Appeals, in holding that Section 13(b) of Title 15 U. S. C. A. has changed the long and well settled rules of this nation in actions at common law with reference to burden of proof and especially in an action to recover under high penal statutes such as triple damages under the Anti-Trust Laws, such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision?

V.

UNCLEAN HANDS.

Is not respondent guilty of coming into court with unclean hands when it sues to recover diminished sums it failed to receive in sales of serum below its posted prices on file with the secretary and the control agency and made in violation of the Serum and Virus Act, the order of the

secretary and the marketing agreement, which violation under the Serum and Virus Act, and particularly subsections (14) and (15) of Section 608c, Title 7 U. S. C. A. subjected it to a fine of not less than $50 nor more than $500 for each sale?

VI.

CONCLUSIVENESS OF SECRETARY'S PREVIOUS RULING.

Is not the ruling of the secretary, dismissing the complaint filed by the control agency against petitioner Anchor involving the same matters of which complaint is made herein, because the fact that allowances were spent by petitioner Anchor was contained in its publicly filed sales or price list and because such practice was acquiesced in by the control agency and also indulged in by other members of the industry and after objections were offered, petitioner Anchor changed its price list to conform to the objection, binding on all the parties hereto, as the secretary was given under the Serum and Virus Act, exclusive powers to regulate and control the industry, with the members of the industry given the right of having the secretary's rulings reviewed by the courts?

VII.

RIGHT OF COOPERATIVE ASSOCIATION TO SUE FOR AND RECOVER DAMAGES SUSTAINED BY ITS MEMBERS.

Can a cooperative association sue to recover alleged damages which have been sustained only by its members and not by itself?

VIII.

COLLATERAL ATTACK UPON PETITIONER ANCHOR'S POSTINGS.

Can respondent recover in the case at bar without collaterally attacking the legality of petitioner Anchor's postings and filings as to prices, terms of sale and discount

which, under the adjudicated cases of this court, is forbidden?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRITS.

1. The question as to whether petitioners were or were not exempt from the penalties and liabilities of the Anti-Trust Laws presents an important question of federal law which has not been, but should be, settled by this court.

   (A) This exemption or immunity question should be settled and set at rest so that the members of the serum and virus industry may definitely know what exemptions and immunities from the Anti-Trust Laws were or were not granted by the Serum and Virus Act.

   (B) A final adjudication of this question is of equal importance to all those who are operating under any order of the secretary and marketing agreement promulgated, made and entered into pursuant to the Agricultural Marketing Agreement Act of 1937.

   (C) This presents a question of law of general national interest because there is a large number of citizens of this nation interested both directly and indirectly in different marketing agreements and different orders of the secretary entered into and promulgated pursuant to the Agricultural Marketing Agreement Act of 1937 which contains identical provisions of exemption from the Anti-Trust Laws.

2. Petitioners, by the decision of the majority of the Court of Appeals, have been deprived of their property without due process of law.

   (A) The action of the majority of the Court of Appeals in affirming the judgment of the District Court has no support in the decision of this Court in the case

of *Lawlor, et al.* v. *Loewe, et al.*, 235 U. S. 522, 59 L. Ed. 341, and on the contrary it is in conflict with the decision of this Court in the case of *Buckeye Powder Co.* v. *duPont de Nemours Powder Co.*, 248 U. S. 55, at 65; 63 L. Ed. 123, at 128.

(B) The majority opinion of the Court of Appeals, basing its judgment of affirmance upon self-serving and opinionated evidence of respondent's president and assistant sales manager, directly conflicts with the decision of this Court in the case of *Boesch* v. *Graff*, 133 U. S. 697, at 708; 33 L. Ed. 787, at 791.

3. The opinion of the majority of the Court of Appeals denies to these petitioners a trial by jury in violation of their constitutional rights under the Seventh Amendment.

(A) The opinion and judgment of the majority of the Court of Appeals, holding that petitioners were not denied a trial by jury, conflicts with the decisions of this Court in the cases of *Berry* v. *United States of America*, 312 U. S. 450, at 452, 453, 85 L. Ed. 945, at 947; *Dimmick* v. *Schiedt*, 293 U. S. 474, at 485, 486, 487, 79 L. Ed. 603, at 610, 611; *Hodges* v. *Easton*, 106 U. S. 408, at 412, 27 L. Ed. 169, at 171; *Fleitmann* v. *Welsbach Street Lighting Co.*, 240 U. S. 27, at 28, 29, 60 L. Ed. 505, at 507.

(B) The opinion of the majority of the Court of Appeals in construing Rule 50b of the Rules of Civil Procedure so as to affirm the action of the District Court in setting aside the verdict of the jury and rendering judgment N.O.V. is in direct conflict with the decision of this Court in the case of *Berry* v. *United States of America*, 312 U. S. 450, at 452 and 453, 85 L. Ed. 945, at 947.

4. In holding a statute, controlling only hearings before the Federal Trade Commission, to be applicable to and governing civil suits at law for damages, the Circuit Court of Appeals so far departed and sanctioned such a departure by the District Court, from the accepted and

usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision.

5. As to whether respondent is barred from recovering because of its coming into court with unclean hands to recover diminished sums it failed to receive on account of unlawful sales made in violation of the Serum and Virus Act and its posted prices, presents an important question of federal law which has not been, but should be, decided by this Court.

6. The effect of the ruling of the secretary in dismissing a complaint involving the same matters of which complaint is now made, and from which no appeal was taken, presents an important federal question which has not been, but should be, decided by this Court.

   (A) Respondent was required to exhaust its administrative remedies before resorting to the courts.

   (B) The members of the serum and virus industry, as well as all other people interested directly or indirectly in any order of the secretary and any marketing agreement promulgated and entered into pursuant to the Agricultural Marketing Agreement Act of 1937, are entitled to have this important federal question determined.

7. The decision of the Circuit Court of Appeals in the case at bar is in direct conflict with the decision of the Eighth Circuit Court of Appeals in the case of *Farmers Co-operative Oil Company* v. *Socony Vacuum Oil Company,* 133 Fed. (2d) 101, upon the question as to whether respondent can maintain a suit to recover for alleged damages, if any, suffered only by its members and not by itself.

8. As respondent could not recover without collaterally attacking the legality of petitioner Anchor's postings and filings as to prices, terms of sale and discount, the opinion of the majority of the Circuit Court of Appeals is in direct conflict with the decisions of this Court in the cases of *Keogh* v. *Chicago & N. W. Ry. Co., et al.,* 260 U. S. 156, at 161 to 163, 67 L. Ed. 183, at 187 to 189;

Texas, Pacific Ry. Co. v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 51 L. Ed. 553; *Robinson* v. *Baltimore & Ohio R. R. Co.*, 222 U. S. 506, at 509, 510, 511, 56 L. Ed. 288, at 289, 290.

WHEREFORE, it is respectfully submitted that Petitioners' prayer for Writs of Certiorari to review said judgments of the Circuit Court of Appeals of the Seventh Circuit should be granted.

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BRIEF AND ARGUMENT.

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

I.

STATEMENT OF THE CASE.

Reference is made to the foregoing petition for Summary Statement of the Case, Citation to Opinions Below, and statement as to Jurisdiction.

II.

SPECIFICATIONS AND ASSIGNMENTS OF ERROR.

Petitioners adopt "Questions Presented" in the foregoing petition on pages 11 to 13, inclusive, as Petitioners' specifications and assignments of error.

III.

SUMMARY OF ARGUMENT.

Petitioners adopt "Reasons Relied On For The Allowance of the Writs" in the foregoing petition on pages 13 and 14 as their Summary of Argument.

IV.

ARGUMENT.

1.

WHAT EXEMPTIONS AND IMMUNITIES FROM THE ANTI-TRUST LAWS WERE GRANTED PETITIONERS AND OTHER HANDLERS AND MANUFACTURERS OF SERUM, PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT.

By reference to Sections herein, unless otherwise designated, we are referring to Sections of Title 7 U. S. C. A.

By *Section 852* it was clearly provided that the making of any such Marketing Agreement should not be held to be a violation of the Anti-Trust Laws, and that any Marketing Agreement entered into by and with approval of the Secretary shall be deemed to be lawful.

In *Sub-section (7) of Section 608c* is found provisions regulating and pertaining to what the Order of the Secretary shall contain.

Under *Sub-sections (14) and (15) of Section 608c,* any handler who violates any provision of the Order, other than requiring the payment of prorata share of expense, upon conviction is subject to a fine of not less than $50.00 or more than $500.00 for each offense. The Secretary is required upon request of the handler to grant such a handler a hearing and to make rulings, and the District Court is granted jurisdiction to review such order or rulings.

Under *Section 608d,* the Secretary was given broad inquisitorial powers to determine whether his Order, the Marketing Agreement and the Act were being carried out,

and *to determine whether or not there had been any abuse of the privilege of exemption from the Anti-Trust Laws.*

Under *Section 608a,* the District Court was given jurisdiction to enforce, prevent and restrain any person from violating the Order, regulations or Agreement. The District Attorney, upon request of the Secretary, was required to institute proceedings to enforce the remedies and to collect forfeitures, and the Secretary was given inquisitorial powers to investigate and conduct hearings to determine the facts for the purpose of referring the matter to the Attorney General.

By *Sub-section (c) of Section 610,* the Secretary with the approval of the President, was authorized to make regulations with force and effect of law, necessary to carry out powers vested in him, and provided that any violation of such regulations, shall be subject to penalties not in excess of $100.00, as may be provided therein.

By *Sub-section (h) of Section 610,* the Secretary in order to efficiently administer the Act in question, the Order of the Secretary and the Marketing Agreement, was given inquisitorial powers, the same which were given the Federal Trade Commission under Sections 48, 49 and 50 of Title 15 U. S. C. A. The members of the industry were thereby subject to additional penalties, for violating any process issued by the Secretary and authorized by these laws.

Under *Paragraph 3 of Section 1 of Article IV* of both the order of the Secretary and the Marketing Agreement, no handlers were permitted to make sales to any class of purchaser unless they had postings filed to sell to such class of purchaser, and then only according to the price and terms of sale set forth in such postings (R. 674, 687).

Under *Section 4 of Article IV* of both the Order of the Secretary and the Marketing Agreement (R. 675, 688),

inserted therein by virtue of the authority contained in Paragraph B of Sub-section (7) of Section 608c, all handlers and manufacturers were required to sell at prices and terms to conform with their postings of prices, terms of sale and discount.

Under *Section 1 of Article V* of both the Order and the Marketing Agreement (R. 675, 688), the secret payment or allowances of rebates, refunds, commission or unearned discount were prohibited. Clearly, for a violation of either of these provisions or any other provision of the Order of the Secretary or Marketing Agreement, each handler or manufacturer would be subject to a fine of $50.00 to $500.00 for each offense as provided by Sub-sections (14) and (15) of Section 608c.

It is submitted that it was the clear intention of the Congress to permit the members of the serum industry, by and with the consent and approval of the Secretary of Agriculture, to do with immunity what the Anti-Trust laws forbade.

It is likewise clear that it was the intention of the Congress and the Congress did vest in the Secretary full power and authority to regulate and control the serum industry.

By the clear and positive terms of the Serum and Virus Act, the members of the industry were subject to severe penalties provided by the Act for each and every violation of the Act, the Order of the Secretary and the Marketing Agreement.

By simple words, free of ambiguities and susceptible of only one meaning, after the industry started to operate under the Serum and Virus Act, the Order of the Secretary and the Marketing Agreement, and after the appointment of the Control Agency to administer the same, and

after the members filed their postings as to prices, terms of sale and discount, they became immune from the penalties and liabilities of the Anti-Trust laws of the nation.

Certainly it cannot be contended that it was the intention of the Congress to subject the members of the industry to the severe penalties and liabilities imposed by the Serum and Virus Act for violating the Act, the Order of the Secretary and the Marketing Agreement and at the same time to subject such members to the penalties and liabilties of the Anti-Trust laws. Such a contention would be placing the Congress of the United States in the position of perpetrating a fraud upon the members of the industry. Such, clearly, was not the intention of the Congress.

Be this position of the Petitioners correct or erroneous, it certainly presents a highly important question to the members of the industry, which has not been decided and determined by this Court but which should be fovever settled and determined by this Court.

As the matter now stands, without a decision of this Court on this specific question, the members of the industry cannot determine and neither can counsel, however learned, advise them as to exemptions or immunities, if any, they have from the Anti-Trust Laws.

The determination of this question by this Court is equally important to all citizens who might directly or indirectly be interested in other Marketing Agreements and Orders of the Secretary made, entered into and promulgated by virtue of the "Agricultural Marketing Agreement Act of 1937", which act contained identically the same provisions with reference to exemption and immunity from the Anti-Trust Laws. (Sec. 608b to 608e, incl. 7 U. S. C. A.)

As illustrative of those who are most vitally interested in this question, in the report of the Director of the Office of Distribution to the War Food Administrator, made on October 16, 1944, is found the following statements:

> "During all or part of the year, 25 marketing agreements and order programs were in force. Approximately 125,000 producers, with an output of some 13 billion pounds of milk worth almost $424,000,000, were subject to the programs." (Page 60 of said report.)
>
> "For citrus, 4 marketing-agreement programs were in effect during the year, including an estimated 48,000 growers of citrus in marketing-program areas and the equivalent on-tree value of the citrus they grow for fresh use estimated at about $180,000,000." (Pages 74 and 75 of said report.)

Petitioners also submit that the adjudication of this question presents a question of law of general national interest and one in which the nation at large is most vitally interested.

It is therefore submitted that Writs of Certiorari should issue to determine this highly important Federal question.

This Court did not decide the question now presented for its determination in the case of *United States* v. *Borden & Co.*, 308 U. S. 188, 84 L. Ed. 181. The question decided by this Court in that case was that the mere enactment of the Agricultural Marketing Agreement Act of 1937 did not create an exemption or immunity from the Anti-Trust laws. These Petitioners make and have made no contention that the enactment of the Serum and Virus Act created the immunity or exemption from the Anti-Trust laws. What these Petitioners do contend is that when they began operating under the Act in question in the manner hereinbefore outlined, the exemption or immunity was then created.

This Court, however, in the Borden case on pages 201 and 202 of 308 U. S. and page 192 of 84 L. Ed. said:

> *"An agreement made with the secretary as a party, or an order made by him, or an arbitration award or agreement approved by him, pursuant to the authority conferred by the Agricultural Act and within the terms of the described immunity, would of course be a defense to a prosecution under the Sherman Act to the extent that the prosecution sought to penalize what was thus validly agreed upon or directed by the secretary. Further than that the Agricultural Act does not go."* (Emphasis ours).

2.

THE TRUE EFFECT OF THE MAJORITY OPINION OF THE COURT OF APPEALS WAS TO DEPRIVE YOUR PETITIONERS OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW.

There is not a scintilla of direct evidence in the record showing or tending to show that the acts of Petitioners, of which complaint is made, damaged Respondent or necessitated or required Respondent to reduce the selling price of its serum. The only evidence upon which the judgment of the Court of Appeals is based is hearsay and opinionated evidence.

Judge Major in his dissenting opinion in holding that there was no direct, competent evidence to sustain the judgment of the District Court, and that a verdict should have been directed by the District Court in favor of these Petitioners said:

> "The only testimony offered by plaintiff as the basis for its right to recover damages is that of its President Huff, and its Assistant Sales Manager, Davis. Neither of these witnesses had anything to do with or any contact with plaintiff's customers. The latter, in making purchases, dealt directly with the

drugstores acting as plaintiff's agents. The testimony of Huff and Davis upon which plaintiff relies was offered and admitted solely as basic proof that plaintiff was required or compelled to reduce the selling price of its serum, and as a result thereof sustained the damage complained of. No other proof was offered on this phase of the case. This testimony is related by the majority and need not be repeated. Reduced to its naked form, it is that the witnesses (Huff and Davis) received complaints from druggists that they could not sell plaintiff's serum at 75c in competition with the Farm Bureaus who were selling at 65c. Upon such complaint being made, plaintiff ordered its druggists to reduce the price to 65c."

Then, after discussing the opinion of this Court in the case of *Lawlor et al.* v. *Loewe et al.*, 235 U. S. 522, at 536, 59 L. Ed. 341, and the decision of this Court in the case of *Buckeye Powder Co.* v. *E. I. DuPont De Nemours Powder Co. et al.*, 248 U. S. 55, at 65, 63 L. Ed. 123, said:

> "Taking these two cases together, it appears that a witness may testify as to the reasons assigned by a customer for refusing or ceasing to do business with the plaintiff. It is admissible, however, only for the purpose of showing the customer's motive and not as proof of a basis for recovery. As I understand, Wigmore on Evidence, 3d Ed., Vol. 6, Par. 1729 (2) makes a similar distinction."

Judge Major then after discussing the opinion of the Second Circuit Court of Appeals in the case of *Greater New York Live Poultry Chamber of Commerce et al.* v. *United States*, 47 Fed. (2d) 156, and other cases cited, in the majority opinion to sustain the right to base their judgment of affirmance upon hearsay evidence and *the decision of the Illinois Supreme Court*, in the case of *Carpenters' Union* v. *The Citizens Committee*, 333 Ill. 225, 164 N. E. 393, 63 A. L. R. 157 said:

"It should be kept in mind in the instant case that neither a druggist nor a customer was offered as a witness. If a druggist had been offered, I think under the rule announced in the authorities relied upon by the majority he could have testified as to the reasons assigned by customers as to why they ceased or refused to purchase plaintiff's product. Such testimony would have been proper for the limited purpose of showing the motive or the state of mind of the customer but not as proof of a right to recover.

* * * * *

"Moreover, the so-called hearsay testimony admitted amounted to nothing more than the opinion or conclusion of plaintiff's druggists that a reduction in price was necessary. This was testimony of a self-serving opinion made by the druggists who naturally were interested in obtaining permission from plaintiff to sell the latter's serum at the lower price. Moreover, the effect of the testimony is that the druggist was of the opinion that it was necessary to reduce the price because of information received from customers that they otherwise would not purchase. The testimony considered in this light is not merely hearsay but is hearsay heaped upon hearsay.

"*So, in my opinion, the evidence complained of was no exception to the hearsay rule, was perhaps inadmissible for any purpose and certainly not for that for which it was offered. If my view in this respect is correct, there should have been a directed verdict for the defendants, because admittedly there was no other testimony which would afford any basis for recovery.*" (Emphasis ours.) (153 Fed. (2d) 915, 916, R. 1259 to 1263, incl.)

We submit that it is well settled by the decisions of this Court that any action of a Court, legislature or executive that is arbitrary, oppressive, unjust, confiscatory or unreasonable, denies to litigants due process of law.

Ballard v. *Hunter*, 204 U. S. 241, at 255, 256, 51 L. Ed. 461, at 472.

Hurtado v. *People of California*, 110 U. S. 516, at 532, 28 L. Ed. 232, at 237.

This Court has religiously held that any order of a commission or an executive of the government promulgated pursuant to legislative authority, which is not based upon facts, or is contrary to the facts, is void and invalid because it does not constitute due process of law.

Florida East Coast Ry. Co. v. *United States,* 234 U. S. 167, at 185, 58 L. Ed. 1267, at 1271 and 1272.

Beaumont, S. L. & W. R. Co. v. *United States,* 282 U. S. 74, at 86, 75 L. Ed. 221, at 230.

Atchison, Topeka & Santa Fe Ry. Co. v. *United States,* 295 U. S. 193, at 201, 202, 79 L. Ed. 1382, at 1389, 1390.

Panama Refining Co. v. *Ryan,* 293 U. S. 388, at 431 to 433, 79 L. Ed. 446, at 464, 465.

3.

THE JUDGMENT OF THIS COURT IN THE CASE OF LAWLOR ET AL. V. LOEWE ET AL., 235 U. S. 522, 59 L. ED. 341, WAS NOT BASED UPON HEARSAY OR OPINIONATED EVIDENCE AND FURNISHES NO SUPPORT FOR THE JUDGMENT OF THE MAJORITY OF THE COURT OF APPEALS. THE OPINION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE DECISION OF THIS COURT IN THE CASE OF BUCKEYE POWDER CO. V. DUPONT DE NEMOURS POWDER CO., 248 U. S. 55, 63 L. ED. 123.

An examination of the voluminous record in the Lawlor case shows that plaintiff offered in evidence the testimony of 46 disinterested witnesses from 11 different states and 19 different cities, who had previously as distributors, wholesalers, dealers, jobbers or retailers, handled plaintiff's hats.

Some of these witnesses were salesmen, not for the plaintiff but of these different distributors, wholesalers, dealers and jobbers. These witnesses testified that the

Labor Unions circularized them. That business agents and members of the Unions called upon them insisting that they stop handling plaintiff's hats or members of the Unions would cease trading with them; that they would picket the witnesses' places of business and sometimes even threatened the plaintiff's dealers in other ways, some even to the extent of inferring violence.

This Court in the case of *Buckeye Powder Co.* v. *DuPont De Nemours Powder Co.*, 248 U. S. 55, 63 L. Ed. 123, speaking through the same Justice, who wrote the opinion in the Lawlor case, on page 65 of 248 U. S. and page 128 of 63 L. Ed. said:

> "• • • Several exceptions were taken to the exclusion of statements by third persons of their reasons for refusing or ceasing to do business with the plaintiff. We should be slow to overthrow a judgment on the ground of either the exclusion or admission of such statements except in a very strong case. But the exclusion in this instance was proper. The statement was wanted not as evidence of the motive of the speakers, but as evidence of the facts recited as furnishing the motives. *Lawlor* v. *Loewe*, 235 U. S. 522, 536, 59 L. ed. 341, 349, 35 Sup. Ct. Rep. 170; *Elmer* v. *Fessenden*, 151 Mass. 359, 362, 5 L. R. A. 724, 22 N. E. 635, 24 N. E. 209."

Petitioners, therefore, insist that the *Lawlor* case furnishes no justification for the majority opinion of the Court of Appeals and that such opinion is in conflict with the opinion of this Court in the case of the Buckeye Powder Company.

4.

THE MAJORITY OPINION OF THE COURT OF APPEALS DENIES THESE PETITIONERS THEIR CONSTITUTIONAL RIGHT OF A TRIAL BY JURY.

The only statement found in the majority opinion of the Court of Appeals on this question is the following:

> "In so doing we think there was no error, nor was there a violation of defendants' right of trial by jury." (153 Fed. (2d) at 915, R. 1259).

Judge Major in his dissenting opinion in speaking upon this question said:

> "Assuming that the view expressed as to the admissibility of this testimony is erroneous, I still think the judgment should be reversed. This is so for the reason that plaintiff's assertion that it was required or compelled to reduce its price in order to meet Farm Bureau competition presented an issue of fact for jury determination.
>
> * * * * *
>
> "In my view, a consideration of plaintiff's testimony alone present a jury question on the vital issue as to whether plaintiff was required or compelled to reduce its price. Accepting it at its face value, it carries little probative weight. As already pointed out, it is based solely on the hearsay testimony coming from plaintiff's druggists who naturally were interested in obtaining permission from plaintiff to sell serum at the reduced price. It was a self-serving statement on their part. As admitted by plaintiff's witness Huff on cross-examination:
>
> > 'I wouldn't say they (the druggists) quit us cold and took you (the Farm Bureaus) on, but I know that was one of the arguments to get this price of ours down.'
>
> * * * * *
>
> "On direct examination Huff testified that plaintiff had not reduced its price in any state other than Illinois. He later admitted, however, that the price was

reduced at three different towns in Iowa, in the same manner as it had been in Illinois. Admittedly, it had no competition from the Farm Bureau or the defendants in Iowa.

* * * * *

"Without going into further detail, it is sufficient to observe that the testimony of both Huff and Davis is in many respects inconsistent with the assertion that plaintiff was required or compelled to reduce the price of its serum. In my opinion, a trier of the facts was not bound to accept as conclusive the hearsay and opinionated evidence of these witnesses that plaintiff was so compelled. *If their testimony presented no issue of fact for a jury on this vital issue and a court was bound to accept it as a matter of law, it would appear that plaintiff's decision on this issue was final.*

* * * * *

"Assuming that plaintiff in the sale of its serum was in competition with the Farm Bureaus, to hold that it was as a matter of law required or compelled to reduce its price is to ignore the realities of the situation.

* * * * *

"I think the court properly submitted to the jury the issue as to whether plaintiff was required or compelled to reduce the price of its serum. The question having been properly submitted, the jury's answer thereto should have been accepted. It follows, in my view, that the court's action in entering a judgment notwithstanding the verdict, was erroneous and that it should be reversed." (Emphasis ours.) (153 Fed. (2d) 917, 918, R. 1263 to 1267, incl.)

Even the trial judge in overruling Respondent's motion for a directed verdict admitted that an attempt had been made to impeach the Respondent's books, that he wouldn't say whether it was or was not successful, but that it was a question that should go to a jury. (R. 629).

The trial court in making one of the very few favorable rulings for Petitioners said:

"Possibly for some of the reasons suggested by Mr. Myers and Mr. Meloy, it would be error to refuse to

permit cross-examination along these lines. You can argue the effect of it to the jury. Proceed." (R. 346).

On cross-examination Respondent's witness, Taylor, a Certified Public Accountant, admitted that with reference to the period covering from January 31, 1937 to May 27, 1937 in regard to at least eight (8) drug stores, that Respondent claimed a reduced price of 10c per 100 ccs. on more serum than the Respondent sold to these drug stores in that period. (R. 317 to 323, incl.). When Respondent attempted to correct these discrepancies, they only made a correction with reference to one (1) drug store. (R. 327 to 332, incl.) Respondent in justification as to the other seven (7) drug stores offered credit memos (R. 332).

While all humanity understands that any one can write a credit memo, it certainly is a deep mystery how any one can suffer a loss on account of reduced prices upon more serum than it sold during that period of time. To say the least, this was one of many circumstances to be weighed, considered and determined by the triers of fact—the jury.

There was not a scintilla of evidence offered that the druggists actually reduced the selling price of the serum to the consumer at 65¢, the only evidence being that the Respondent reduced its price to the drug stores from 63¢ to 53¢.

The majority opinion of the Court of Appeals entirely overlooks the fact that Respondent's alleged and purported allowances and reductions could have been made by Respondent for several purposes; to meet competition of its forty (40) other competitors with whom it was in direct competition, or, to sell patrons and customers of its forty (40) other competitors, or, for the purpose of paying Veterinarians to assist farmers and teach them how to vaccinate their hogs, as it did in at least two (2) towns in Iowa. (R. 356 to 360, incl.)

No principle of law has been more clearly announced and more religiously followed by this Court and other Courts of the nation than the principle that where the evidence of a case is of such a nature so that reasonable minds might differ as to its effect, or might draw different inferences therefrom, it is error for the trial court to direct a verdict or render judgment n.o.v. for either party.

Certainly it must be conceded that Judge Major possesses a reasonable mind. Then, clearly, there is presented here a case where reasonable minds have already differed as to the effect of the evidence of the case and that different inferences have been drawn therefrom.

5.

THE OPINION AND JUDGMENT RENDERED BY THE MAJORITY OF THE COURT OF APPEALS HOLDING THAT PETITIONERS WERE NOT DENIED A TRIAL BY JURY IS IN DIRECT CONFLICT WITH THE DECISIONS OF THIS COURT IN THE CASES OF: BERRY V. UNITED STATES OF AMERICA, 312 U. S. 450, at 452, 453, 85 L. ED. 945, at 947; DIMMICK V. SCHIEDT, 293 U. S. 474, at 485, 486, 487, 79 L. ED. 603, at 610, 611; HODGES V. EASTON, 106 U. S. 408, at 412, 27 L. ED. 169, at 171; FLEITMANN V. WELSBACH STREET LIGHTING CO., 240 U. S. 27, at 28, 29, 60 L. ED. 505, at 507.

This Court in the case of *Fleitmann* v. *Welsbach Street Lighting Company*, 240 U. S. 27, 60 L. Ed. 505, on page 29 of 240 U. S. and page 507 of 60 L. Ed. said:

> *"But we agree with the courts below that when a penalty of triple damages is sought to be inflicted, the statute should not be read as attempting to authorize liability to be enforced otherwise than through the verdict of a jury in a court of common law. On the contrary, it plainly provides the latter remedy, and it provides no other."* (Emphasis ours.)

That the decision of the Court of Appeals is in conflict with the above decisions of this Court is readily apparent by a consideration of this Court's opinions in those cases. We will, therefore, not further lengthen this brief in this respect.

6.

THE HOLDING OF THE MAJORITY OPINION OF THE COURT OF APPEALS IN CONSTRUING RULE 50(b) SO AS TO AFFIRM THE ACTION OF THE TRIAL COURT IN SETTING ASIDE THE VERDICT OF THE JURY AND RENDERING JUDGMENT N.O.V. IS IN CONFLICT WITH THE DECISION OF THIS COURT IN THE CASE OF: BERRY V. UNITED STATES OF AMERICA, 312 U. S. 450, at 452, 453, 85 L. ED. 945, at 947.

This Court in the case of *Berry* v. *United States of America, supra,* in reversing a judgment of the Circuit Court of Appeals of the Second Circuit, which Court had reversed a judgment of the District Court and directed that a judgment be entered under Rule 50(b) in favor of the defendant, on pages 452 and 453 of 312 U. S. and page 947 of 85 L. Ed. said:

> "Rule 50(b) goes further than the old practice in that district judges, under certain circumstances, are now expressly declared to have the right (but not the mandatory duty) to enter a judgment contrary to the jury's verdict without granting a new trial. *But that rule has not taken away from juries and given to judges any part of the exclusive power of juries to weigh evidence and determine contested issues of fact—a jury being the constitutional tribunal provided for trying facts in courts of law.*" (Emphasis ours.)

7.

THE ACTION OF THE MAJORITY OF THE COURT OF APPEALS IN AFFIRMING THE JUDGMENT OF THE DISTRICT COURT BASED ONLY UPON THE OPINIONATED EVIDENCE OF THE RESPONDENT'S PRESIDENT AND ASSISTANT SALES MANAGER IS IN DIRECT CONFLICT WITH THE DECISION OF THIS COURT IN THE CASE OF: BOESCH V. GRAFF, 133 U. S. 697, 33 L. ED. 787.

In the case of *Boesch* v. *Graff, supra,* the plaintiff sued to recover damage for the infringement of a patent. This Court in holding that the opinionated evidence of the plaintiff was not sufficient to sustain a recovery, on page 708 of 133 U. S. and page 791 of 33 L. Ed. said:

> "Conceding that as Graff granted no licenses, and had no established license fee, but supplied the demand for his burner himself, and was able to supply that demand, and that, therefore, if he was compelled to lower the price by the infringement he could recover for the loss thus sustained, *does the evidence satisfactorily establish that the reduction in prices was due solely to the acts of the defendants in infringing?*
>
> *The opinion, of Mr. and Mrs. Graff, to that effect is not sufficient, and even that is so qualified as to fall far short of expressing it.*" (Emphasis ours.)

It must be concededly admitted that in the case at bar there was no evidence introduced whatsoever to show that the Respondent was required to reduce its selling price of serum in Illinois, except the opinionated evidence of Respondent's President and Assistant Sales Manager. It, therefore, of necessity must follow that the opinion of the Court of Appeals is in direct conflict with the opinion of this Court.

8.

THE OPINION OF THE MAJORITY OF THE CIRCUIT COURT OF APPEALS IN HOLDING THAT SECTION 13(b) OF TITLE 15 U. S. C. A. HAS CHANGED THE LONG AND WELL SETTLED RULES OF THIS NATION IN ACTIONS AT COMMON LAW WITH REFERENCE TO BURDEN OF PROOF, AND ESPECIALLY IN AN ACTION TO RECOVER UNDER HIGH PENAL STATUTES SUCH AS TRIPLE DAMAGES UNDER THE ANTI-TRUST LAWS, IS SUCH A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS BY THE COURT OF APPEALS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

The majority of the Court of Appeals held in the case at bar that the burden was shifted to petitioners to prove that the alleged and purported damage, if any, was otherwise caused than by the action of these petitioners of which complaint is made. The court in its opinion said:

> "*Under this statute when a prima facie case is made, the burden shifts to the defendant, if it can do so, to show that the damage, if any, was otherwise caused. 15 U. S. C. A. Sec 13(b).*" (Emphasis ours.)
>
> (153 Fed. (2d) 907, at 912. R. 1254.)

In so holding, the Court of Appeals has abrogated and destroyed the law long and well settled by this court, and other federal courts, requiring the plaintiff in such cases to prove with definiteness and certainty that the acts in question damaged the respondent.

The rule which has been announced and religiously followed is well stated by a decision of the Sixth Circuit Court of Appeals, citing decisions of this court to sustain itself, in the case of *Dickinson* v. *O. & W. Thum Co.*, 8 Fed. (2d) 570, wherein the Court on pages 575 and 576, said:

"When a plaintiff in a trade-mark or unfair competition case seeks to recover damages, the burden is on him to prove by competent and sufficient evidence his lost sales, or that he was compelled to reduce prices as the result of his competitor's wrongful conduct. There is no presumption of law or of fact that a plaintiff would have made the sales that the defendant made. In this case there is no sufficient, much less conclusive, evidence to show that plaintiff would have made all or any substantial part of the sales made by the defendant. *Nor is there any adequate, much less conclusive, evidence that plaintiff reduced its price as a result of defendant's wrongful conduct. The evidence, on the other hand, is quite clear and convincing to the contrary.* The same observations apply to the claim of damages to plaintiff's business from the inferior quality of defendant's product; it is not supported by adequate proof. For decisions showing the burden cast upon one claiming damages, and denying relief in the face of evidence of greater probative force, see the following *Cornely* v. *Marckwald*, 131 U. S. 159, 9 S. Ct. 744, 33 L. Ed. 117; *Boesch* v. *Graff*, 133 U. S. 697, 10 S. Ct. 378, 33 L. Ed. 787; *Dowagiac Mfg. Co.* v. *Minnesota Plow Co.*, 235 U. S. 641, 648, 35 S. Ct. 221, 59 L. Ed. 398; *McSherry* v. *Dowagiac Mfg. Co.* (6 C. C. A.) 160 F. 948, 961, 89 C. C. A. 26; *Randall Co.* v. *Fogelsong Mach Co.* (6 C. C. A.) 216 F. 601, 132 C. C. A. 605; *United States Frumentum Co.* v. *Lauhaff* (6 C. C. A.) 216 F. 610, 614, 132 C. C. A. 614." (Emphasis ours.)

In the case of the *American Sea Green Slate Co. et al.* v. *O'Halloran et al.* (2nd C. C. A.), 229 Fed. 77, the Court on pages 79 and 81 said:

"These damages must be proved by facts from which their existence is logically and legally inferable—not by conjectures, or estimates. They must not be speculative, remote or uncertain. * * * Moreover, without any testimony from the three concerns, it is assumed that they ceased buying from the plaintiffs because of defendants' acts. But these three concerns were free to change at will; several reasons might be suggested why they ceased buying from the plaintiff. It was for

> the plaintiffs to show that the change was *because* of defendants' combination. If that were the reason, it was *provable* out of the mouths of the three dealers; merely to infer it from the fact that they made the change is pure speculation."

In the case of the *Twin Ports Oil Co.* v. *Pure Oil Co.*, 119 Fed. (2d) 747, the Eighth Circuit Court of Appeals on page 751, said:

> "It is to be noted that here a recovery is sought for triple damages, a privilege that immediately suggests necessary definiteness in the basis of damages as attributable to the violation of the Federal Act."

Section 13(b) of Title 15 U. S. C. A. has no application to courts of law. Its only application is to hearings before the Federal Trade Commission for cease and desist orders. To justify this position one needs only to read the section of the act itself, which is in words and figures, as follows, to-wit:

> "Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: Provided, however, That nothing contained in sections 12, 13, 14-21, 22-27 of this title shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

We, therefore, submit that this ruling of the Circuit Court of Appeals is erroneous and in conflict with the well established and elementary law of this land relative to bur-

den of proof in civil cases for damages, and is a departure from the accepted and usual course of judicial proceedings requiring this court to exercise its power of supervision.

9.

AS RESPONDENT DURING THE TIME IN QUESTION WAS OPERATING UNDER THE SERUM AND VIRUS ACT, AND SUBJECT ONLY TO THE PENALTIES AND LIABILITIES THEREBY PRESCRIBED, AND WAS NOT SUBJECT TO THE PENALTIES AND LIABILITIES OF THE ANTI-TRUST LAWS, WHETHER RESPONDENT CAME INTO COURT WITH UNCLEAN HANDS PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN BUT SHOULD BE DECIDED BY THIS COURT.

During the period of time in question Respondent insists it sold part of its serum to consumers at 65¢ per 100 ccs. instead of its posted price and sues to recover for the difference between the diminished sums which it alleges it did receive and the sums it would have received had it sold its serum at its posted prices. (R. 68.)

If Respondent and its agents or dealers actually did sell serum during this period of time to consumers at 65¢, it violated Paragraph B of Sub-section (7) of Section 608c of Title 7 U. S. C. A., as well as Paragraph 3 of Section 1 of Article IV of both the Order of the Secretary and the Marketing Agreement.

The Respondent for each of said sales so alleged to have been made by it, subjected itself to a fine of not less than $50.00 or more than $500.00 as provided by Paragraph (14) of Section 608c, Title 7 U. S .C. A. Clearly, Respondent with reference to its transactions, for which it sues to recover damages, comes into Court with unclean hands.

The majority of the Circuit Court of Appeals justified Respondent's action in making the sales in question in violation of Respondent's posted prices and in violation of the Serum and Virus Act, the Order of the Secretary and the Marketing Agreement by the provisions of the Robinson-Patman Act. In its opinion the Court said:

> *"Furthermore,* 15 *U. S. C. A., Sec.* 13(b) *provides that the alleged inequitable conduct of plaintiff, here relied upon, is not a violation of that act on the part of the plaintiff."*
> (153 Fed. (2d) 907, at 912, R. 1254.)
> (Emphasis ours.)

During all the period of time in question Respondent was operating under the Serum and Virus Act, the Order of the Secretary and the Marketing Agreement. Respondent was not liable for the penalties and liabilities prescribed by the Anti-Trust laws. It was only liable for the penalties and liabilities of the Serum and Virus Act. It, therefore, cannot justify its violation of the Serum and Virus Act, the Order of the Secretary and the Marketing Agreement, and its postings of prices, terms of sale and discount by any provision of the Robinson-Patman Act. It is submitted that this presents an important question of Federal law which has not been but should be decided by this Court.

10.

THE SECRETARY OF AGRICULTURE HAVING BEEN GIVEN THE EXCLUSIVE RIGHT TO ADMINISTER THE SERUM AND VIRUS ACT SUBJECT ONLY TO THE RIGHT OF ANY AGGRIEVED PARTY TO HAVE THE SECRETARY'S RULINGS REVIEWED BY THE COURTS, THE ORDER OF THE SECRETARY DISMISSING THE COMPLAINT FILED BY THE CONTROL AGENCY INVOLVING THE SAME MATTERS AS INVOLVED IN THE CASE AT BAR, SHOULD BE CONCLUSIVE ON ALL THE PARTIES, WHICH PRESENTS AN IMPORTANT FEDERAL QUESTION WHICH HAS NOT BEEN BUT SHOULD BE DETERMINED BY THIS COURT.

Petitioner Anchor, in its answer, specially pleaded this defense. (R. 97, 98.) Upon motion of Respondent, the District Court struck this defense. (R. 115.) In the trial of the case, Petitioners offered to prove these facts, which evidence was rejected by the District Court. (R. 529 to 553, inclusive.)

The complaint involved the same matters of which complaint is made in this action. The Secretary of Agriculture denied the complaint because Petitioner Anchor's publicly filed price list with the Control Agency contained the provision with reference to spending liberal allowances for advertising and sales promotion work, it had been permitted to operate in this manner for two and one-half years, that the action had been acquiesced in by the Control Agency and indulged in by other members of the industry, and because when the objections were first made Petitioner Anchor changed its postings to conform with the objection. (R. 530, 531.)

From this action and ruling of the Secretary, no appeal was taken to the courts as is provided therefor by the Serum and Virus Act in question.

As the Secretary was given the exclusive right to administer the act and control the industry, and Respondent not having prosecuted its remedy as provided by the act, Respondent is conclusively bound by the ruling of the Secretary.

Myers v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, at 49 to 52, incl., 82 L. Ed. 638, at 643 to 645, incl.

Macauley et al. v. *Waterman Steamship Corp.* (not yet officially published) 90 L. Ed. Advance Sheet 11, page 676.

11.

THE DECISION OF THE MAJORITY OF THE COURT OF APPEALS IS IN CONFLICT WITH THE DECISION OF THE EIGHTH CIRCUIT COURT OF APPEALS IN THE CASE OF FARMERS CO-OPERATIVE OIL COMPANY V. SOCONY VACUUM OIL COMPANY, 133 FED. (2d) 101.

In the *Farmers Co-operative Oil Company* case, the plaintiff, like the respondent, was incorporated under *Chapter* 390 *GI of the Code of Iowa.*

In the *Farmers Co-operative Oil Company* case, suit was brought to recover damages for causing an increase in the price of gasoline, by wrongful conspiracy, 2¼¢ per gallon. The Co-operative in that case passed the increased price on to its members. The Eighth Circuit Court of Appeals held that the right of action belonged to the member customers of the Co-operative and not to the Co-operative, except such damage as the Co-operative itself suffered. That, therefore, under Rule 17(a) of the Rules of Civil procedure the Co-operative could not maintain the action except for the damage, if any, it itself actually sustained, either on its own behalf or in a representative capacity.

In the case at bar, that part of the answer of the Petitioners pleading this defense, upon motion of Respondent, was stricken by the District Court. (R. 75, 76, 98, 115.) All allegations therein contained were admitted. For the purpose of considering this question, it therefore must be conceded that the respondent's earnings during all the time in question exceeded its expenses of operation, taxes, interest, insurance, etc., and after providing reserves and surpluses permitted by the statutes, had substantial earnings which, under the statutes of Iowa, were required to be distributed to its members. Therefore, in the case at bar the loss, if any, was passed on to or suffered by the members of Respondent and not by Respondent itself.

Had the Circuit Court of Appeals followed the Eighth Circuit Court of Appeals in the *Farmers Co-operative Oil Company* case, it necessarily follows that it would have been compelled to have held that the Respondent could not have maintained this action.

There is, therefore, clearly presented a conflict between the decision of the Circuit Court of Appeals in the case at bar and the decision of the Circuit Court of Appeals for the Eighth Circuit in the *Farmers Co-operative Oil Company* case. There is also presented here a question of general law of national importance which should be settled and determined by a decision of this Court reviewing the case by writs of certiorari.

CONCLUSION.

It is, therefore, submitted that writs of certiorari should be allowed as prayed for and the judgments of the court below should be reversed.

Respectfully submitted,

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APPENDIX.

THE PROVISIONS OF THE CONGRESSIONAL ENACTMENT IN QUESTION KNOWN AS THE ANTI-HOG CHOLERA SERUM AND HOG CHOLERA VIRUS ACT.

This Enactment, together with all other provisions of the Agricultural Adjustment Act made applicable, is found in Title 7 U. S. C. A., and the provisions thereof with their proper citations under Title 7 are as follows, to-wit:

"Section 851. *Declaration of policy.*

"It is hereby declared to be the policy of Congress to insure the maintenance of an adequate supply of anti-hog-cholera serum and hog-cholera virus by regulating the marketing of such serum and virus in interstate and foreign commerce, and to prevent undue and excessive fluctuations and unfair methods of competition and unfair trade practices in such marketing. Aug. 24, 1935, c. 641, Sec. 56, 49 Stat. 781."

"Section 852. *Marketing agreements with handlers; exemption from anti-trust laws.*

"In order to effectuate the policy declared in section 851 of this title the Secretary of Agriculture shall have the power, after due notice and opportunity for hearing, to enter into marketing agreements with manufacturers and others engaged in the handling of anti-hog-cholera serum and hog-cholera virus only with respect to such handling as is in the current of interstate or foreign commerce or which directly burdens, obstructs, or affects interstate or foreign commerce in such serum and virus. Such persons are in section 854 of this title referred to as 'handlers.' The making of any such agreement shall not be held to be in violation of any of the anti-trust laws of the United

States, and any such agreement shall be deemed to be lawful. Aug. 24, 1935, c. 641, Sec. 57, 49 Stat. 781."

"Section 853. *Terms and conditions of marketing agreements.*

"Marketing agreements entered into pursuant to section 852 of this title shall contain such one or more of the following terms and conditions and no others as the Secretary finds, upon the basis of the hearing provided for in section 852 of this title, will tend to effectuate the policy declared in section 851 of this title:

"(a) One or more of the terms and conditions specified in subsection (7) of section 608c of this title.

"(b) Terms and conditions requiring each manufacturer to have available on May 1 of each year a supply of completed serum equivalent to not less than 40 per centum of his previous year's sales. Aug. 24, 1935, c. 641, Sec. 58, 49 Stat. 781."

"Section 854. *Order regulating handlers; issuance and terms.*

"Whenever all the handlers of not less than 75 per centum of the volume of anti-hog-cholera serum and hog-cholera virus which is handled in the current of interstate or foreign commerce, or so as directly to burden, obstruct, or affect interstate or foreign commerce, have signed a marketing agreement entered into with the Secretary of Agriculture pursuant to section 852 of this title, the Secretary of Agriculture shall issue an order which shall regulate only such handling in the same manner as, and contain only such terms and conditions as are contained in such marketing agreement, and shall from time to time amend such order in conformance with amendments to such marketing agreement. Such order shall terminate upon termination of such marketing agreement as provided in such marketing agreement. Aug. 24, 1935, c. 641, Sec. 59, 49 Stat. 781."

"Section 855. *Applicability of other laws.*

"Subject to the policy declared in section 851 of this title, the provisions of subsection (6), (7), (8), and (9) of section 608a and of subsections (14) and (15)

of section 608c of this title, are made applicable in connection with orders issued pursuant to section 854 of this title, and the provisions of section 608d of this title are hereby made applicable in connection with marketing agreements entered into pursuant to section 852 of this title and orders issued pursuant to section 854 of this title. The provisions of subsections (a), (b) (2), (c), (f), (h), and (i) of section 610 of this title, as amended, are hereby made applicable in connection with the administration of this chapter. Aug. 24, 1935, c. 641, Sec. 60, 49 Stat. 782."

"Section 608a.

"(6) The several district courts of the United States are hereby vested with jurisdiction specifically to enforce, and to prevent and restrain any person from violating any order, regulation, or agreement, heretofore or hereafter made or issued pursuant to this chapter, in any proceeding now pending or hereafter brought in said courts."

"(7) Upon the request of the Secretary of Agriculture, it shall be the duty of the several district attorneys of the United States, in their respective districts, under the directions of the Attorney General, to institute proceedings to enforce the remedies and to collect the forfeitures provided for in, or pursuant to, this chapter. Whenever the Secretary, or such officer or employee of the Department of Agriculture as he may designate for the purpose, has reason to believe that any handler has violated, or is violating, the provisions of any order or amendment thereto issued pursuant to this title, the Secretary shall have power to institute an investigation and, after due notice to such handler, to conduct a hearing in order to determine the facts for the purpose of referring the matter to the Attorney General for appropriate action."

"(8) The remedies provided for in this section shall be in addition to, and not exclusive of, any of the remedies or penalties provided for elsewhere in this chapter or now or hereafter existing at law or in equity."

"(9) The term 'person' as used in this chapter includes an individual, partnership, corporation, associa-

tion, and any other business unit. May 12, 1933, c. 25, Title 1, Sec. 8a; May 9, 1934, 11:23 a. m., c. 263, Sec. 4, 48 Stat. 672; Aug. 24, 1935, c. 641, Sections 8, 9, 10, 49 Stat. 762; June 3, 1937, c. 296, Sections 1, 2(c), 50 Stat. 246, 247."

"Section 608c.

"(7) In the case of the agricultural commodities and the products thereof specified in subsection (2) orders shall contain one or more of the following terms and conditions:

"(A) Prohibiting unfair methods of competition and unfair trade practices in the handling thereof.

"(B) Providing that (except for milk and cream to be sold for consumption in fluid form) such commodity or product thereof, or any grade, size, or quality thereof shall be sold by the handlers thereof only at prices filed by such handlers in the manner provided in such order.

"(i) To administer such order in accordance with its terms and provisions;

"(ii) To make rules and regulations to effectuate the terms and provisions of such order;

"(iii) To receive, investigate, and report to the Secretary of Agriculture complaints of violations of such order; and

"(iv) To recommend to the Secretary of Agriculture amendments to such order.

"No person acting as a member of an agency established pursuant to this paragraph (C) shall be deemed to be acting in an official capacity, within the meaning of section 610(g) of this title, unless such person receives compensation for his personal services from funds of the United States.

"(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5), (6), and (7) and necessary to effectuate the other provisions of such order."

"(14) Any handler subject to an order issued under this section, or any officer, director, agent, or employee of such handler, who violates any provision of

such order (other than a provision calling for payment of a pro rata share of expenses) shall, on conviction, be fined not less than $50 or more than $500 for each such violation, and each day during which such violation continues shall be deemed a separate violation: *Provided,* That if the court finds that a petition pursuant to subsection (15) of this section was filed and prosecuted by the defendant in good faith and not for delay, no penalty shall be imposed under this subsection for such violations as occurred between the date upon which the defendant's petition was filed with the Secretary, and the date upon which notice of the Secretary's ruling thereon was given to the defendant in accordance with regulations prescribed pursuant to subsection (15)."

"(15) (A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

"(B) The District Courts of the United States (including the district court of the United States for the District of Columbia) in any district in which such handler is an inhabitant, or has his principal place of business, are hereby vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings insti-

tuted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 608a(6) of this title. Any proceedings brought pursuant to section 608a(6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection (15) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15)."

"Section 608d. *Books and records; disclosure of information.*

"(1) All parties to any marketing agreement, and all handlers subject to an order, shall severally, from time to time, upon the request of the Secretary, furnish him with such information as he finds to be necessary to enable him to ascertain and determine the extent to which such agreement or order has been carried out or has effectuated the declared policy of this chapter, and with such information as he finds to be necessary to determine whether or not there has been any abuse of the privilege of exemptions from th antitrust laws. Such information shall be furnished in accordance with forms of reports to be prescribed by the Secretary. For the purpose of ascertaining the correctness of any report made to the Secretary pursuant to this subsection, or for the purpose of obtaining the information required in any such report, where it has been requested and has not been furnished, the Secretary is hereby authorized to examine such books, papers, records, copies of income-tax reports, accounts, correspondence, contracts, documents, or memoranda, as he deems relevant and which are within the control (1) of any such party to such marketing agreement, or any such handler, from whom such report was requested or (2) of any person having, either directly or indirectly, actual or legal control of or over such party or such handler or (3) of any subsidiary of any such party, handler, or person.

"(2) Notwithstanding the provisions of section 607 of this title, all information furnished to or acquired

by the Secretary of Agriculture pursuant to this section shall be kept confidential by all officers and employees of the Department of Agriculture and only such information so furnished or acquired as the Secretary deems relevant shall be disclosed by them, and then only in a suit or administrative hearing brought at the direction, or upon the request, of the Secretary of Agriculture, or to which he or any officer of the United States is a party, and involving the marketing agreement or order with reference to which the information so to be disclosed was furnished or acquired. Nothing in this section shall be deemed to prohibit (A) the issuance of general statements based upon the reports of a number of parties to a marketing agreement or of handlers subject to an order, which statements do not identify the information furnished by any person, or (B) the publication by direction of the Secretary, of the name of any person violating any marketing agreement or any order, together with a statement of the particular provisions of the marketing agreement or order violated by such person. Any such officer or employee violating the provisions of this section shall upon conviction be subject to a fine of not more than $1,000 or to imprisonment for not more than one year, or to both, and shall be removed from office. May 12, 1933, c. 25, Title I, Sec. 8d; Aug. 24, 1935, c. 641, Sec. 6, 49 Stat. 761; June 3, 1937, c. 296, Sec. 1, 50 Stat. 246."

"Section 610. *Powers of Secretary of Agriculture generally—Appointment of officers and employees; exemption from civil service regulations; salaries; impounding appropriations.*

"(a) The Secretary of Agriculture may appoint such officers and employees, subject to the provisions of chapter 13 of Title 5, and such experts, as are necessary to execute the functions vested in him by this chapter; and the Secretary may make such appointments without regard to the civil service laws or regulations: Provided, That no salary in excess of $10,000 per annum shall be paid to any officer, employee, or expert of the Agricultural Adjustment Administration, which the Secretary shall establish in the Department of Agriculture for the administration of the functions

vested in him by this chapter: And provided further, That the State Administrator appointed to administer this chapter in each State shall be appointed by the President, by and with the advice and consent of the Senate. Section 8 of Title II of the Act entitled 'An Act to maintain the credit of the United States Government,' approved March 20, 1933 (Title 5, Sec. 673 note), to the extent that it provides for the impoundment of appropriations on account of reductions in compensation, shall not operate to require such impoundment under appropriations contained in this chapter."

"(b) (2) Each order issued by the Secretary under this chapter shall provide that each handler subject thereto shall pay to any authority or agency established under such order such handler's pro rata share (as approved by the Secretary) of such expenses as the Secretary may find will necessarily be incurred by such authority or agency, during any period specified by him, for the maintenance and functioning of such authority or agency, other than expenses incurred in receiving, handling, holding, or disposing of any quantity of a commodity received, handled, held, or disposed of by such authority or agency for the benefit or account of persons other than handlers subject to such order. The pro rata share of the expenses payable by a cooperative association of producers shall be computed on the basis of the quantity of the agricultural commodity or product thereof covered by such order which is distributed, processed, or shipped by such cooperative association of producers. Any such authority or agency may maintain in its own name, or in the names of its members, a suit against any handler subject to an order for the collection of such handler's pro rata share of expenses. The several District Courts of the United States are hereby vested with jurisdiction to entertain such suits regardless of the amount in controversy."

"(c) The Secretary of Agriculture is authorized, with the approval of the President, to make such regulations with the force and effect of law as may be necessary to carry out the powers vested in him by this chapter. Any violation of any regulation shall be sub-

ject to such penalty, not in excess of $100, as may be provided therein."

"(f) The provisions of this chapter shall be applicable to the United States and its possessions, except the Philippine Islands, the Virgin Islands, American Samoa, the Canal Zone, and the island of Guam; except that, in the case of sugar beets and sugarcane, the President, if he finds it necessary in order to effectuate the declared policy of this chapter, is authorized by proclamation to make the provisions of this chapter applicable to the Philippine Islands, the Virgin Islands, American Samoa, the Canal Zone and/or the island of Guam."

"(h) For the efficient administration of the provisions of sections 608 to 619 of this chapter, the provisions, including penalties, of sections 48, 49, and 50 of Title 15, are made applicable to the jurisdiction, powers, and duties of the Secretary in administering the provisions of this chapter and to any person subject to the provisions of this chapter, whether or not a corporation. Hearings authorized or required under this chapter shall be conducted by the Secretary of Agriculture or such officer or employee of the Department as he may designate for the purpose. The Secretary may report any violation of any agreement entered into under sections 608 to 619 of this chapter, to the Attorney General of the United States, who shall cause appropriate proceedings to enforce such agreement to be commenced and prosecuted in the proper courts of the United States without delay."

"(i) The Secretary of Agriculture upon the request of the duly constituted authorities of any State is directed, in order to effectuate the declared policy of this chapter and in order to obtain uniformity in the formulation, administration, and enforcement of Federal and State programs relating to the regulation of the handling of agricultural commodities or products thereof, to confer with and hold joint hearings with the duly constituted authorities of any State, and is authorized to cooperate with such authorities; to accept and utilize, with the consent of the State, such State and local officers and employees as may be necessary; to avail himself of the records and facilities of

such authorities; to issue orders (subject to the provisions of section 608c of this title) complementary to orders or other regulations issued by such authorities; and to make available to such State authorities the records and facilities of the Department of Agriculture: *Provided,* That information furnished to the Secretary of Agriculture pursuant to section 608d (1) of this title shall be made available only to the extent that such information is relevant to transactions within the regulatory jurisdiction of such authorities, and then only upon a written agreement by such authorities that the information so furnished shall be kept confidential by them in a manner similar to that required of Federal officers and employees under the provisions of section 608d (2) of this title."